UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SWINOMISH INDIAN TRIBAL COMMUNITY, a federally recognized Indian tribe, Plaintiff, v. BNSF RAILWAY COMPANY, a Delaware corporation, Defendant.	C15-00543-RSL SEATTLE, WASHINGTON December 15, 2016 Motion Hearing

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT S. LASNIK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

Christopher I. Brain
Paul W. Moomaw
Tousley Brain Stephens
1700 Seventh Avenue
Suite 2200
Seattle, WA 98101

Stephen T. LeCuyer
Office of the Tribal Attorney
Swinomish Indian Tribal Community
11404 Moorage Way
La Conner, WA 98257

For the Defendant:

Stellman Keehnel
Jeffrey B. DeGroot
Andrew R. Escobar
DLA Piper U.S.
701 Fifth Avenue
Suite 7000
Seattle, WA 98104

THE COURT: Good morning. Thank you. Please be seated.

THE CLERK: Case C15-543-L, Swinomish Indian Tribal Community v. BNSF Railroad Company.

Counsel, would you please rise and make your appearances?

MR. BRAIN: Chris Brain representing the Tribe.

THE COURT: Okay.

MR. MOOMAW: Paul Moomaw representing the Tribe.

MR. LECUYER: Stephen LeCuyer representing the Tribe.

THE COURT: Great. Thank you.

MR. KEEHNEL: Good morning, Your Honor. Stellman Keehnel of DLA Piper for Burlington Northern Santa Fe.

MR. DEGROOT: Jeff DeGroot on behalf of BNSF.

THE COURT: Great.

MR. ESCOBAR: Good morning, Your Honor. Andrew Escobar with DLA Piper on behalf of BNSF as well.

THE COURT: Thank you very much.

MR. KEEHNEL: And, Your Honor, this morning, two counsel from Burlington Northern Sante Fe, David Rankin, Senior General Attorney, and Tyler White, General Attorney.

THE COURT: Great. Welcome.

MR. KEEHNEL: Up from Texas to say hi.

THE COURT: And you have some clients with you also, Mr. Brain.

MR. BRAIN: Yes, I do, Your Honor. I have three senators with me. I have Chairman Brian Cladoosby.

THE COURT: Welcome.

MR. BRAIN: I have Leon John.

THE COURT: Hello.

MR. BRAIN: And I also have Kevin Paul.

THE COURT: Great. Thanks very much. I appreciate you all being here.

All right. Mr. Brain, we will start with your summary judgment motion, and then we will have a response from Burlington Northern, and then their summary motion, and the response, you will respond to theirs and reply to yours, and then Mr. Keehnel can reply on his, okay?

MR. BRAIN: Thank you, Your Honor.

The issue before this Court on these motions is really fairly simple, fairly direct. The question is, does 25 U.S.C. 323 through 328 control, or does 49 U.S.C. 10501(b) trump the express terms of the right-of-way authorized by 25 U.S.C., which we refer to as the Indian Right-of-Way Act.

We submit that the statutory scheme and case law compel denial of preemption by the ICCTA. BNSF relies on generic reference in 10501(b), and I will read that to you. It says, "Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

The issue is, does this reference to a generic federal law

preempt other federal laws? The issue of preemption is that it arises out of the U.S. Constitution Supremacy Clause, but that clause only references state and local jurisdictions. And I will quote that clause. It states the laws of the U.S. "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The IRWA is a specific federal law. We are not dealing with state laws or tort claims. We are dealing with a right-of-way that is specifically addressed and granted by that Act. Based on the ICCTA, BNS believes and maintains that it impliedly repeals the IRWA.

As pointed out in the cases cited on page 16 of our motion, this argument has no merit. For example, Your Honor, I will quote from *BNSF Railway v. Albany,* where the Court stated, "Although a literal reading of section 10501(b) might suggest that it supersedes other federal law, the Board and the courts have rejected such an interpretation as overbroad and unworkable."

Without specific reference, federal laws cannot preempt another. And, in fact, Your Honor, there is no case cited which holds that the ICCTA has indeed preempted another federal statute.

THE COURT: So if you are right, Mr. Brain, then we have two laws, each of which has validity, and it's the Court's job to

try to make them work either together or in ways that don't absolutely undermine each other. So how do I do that?

MR. BRAIN: Your Honor, I think, in that situation, obviously, the cases have held that you try to harmonize them. And if you cannot harmonize them, then you have to see which one should prevail. And here we believe that the case law and the cases clearly indicate that with respect to laws related to Indians, that statute is primary. And I think there's a whole bunch of other issues, which I will get to, that explain that.

THE COURT: But even saying that, what does the Indian Right-of-Way Act say would have to happen for the Tribe and the federal government, through the Bureau of Indian Affairs, or the Secretary of Interior, to withdraw from Burlington Northern the right-of-way or the permission to use the right-of-way?

MR. BRAIN: Well, the Right-of-Way Act itself provides that it can be terminated if there's a breach of the grant. I mean, that's very specific in the Act.

And I think the other issue, and we will get into that, is the fact that, what is the grant, and is it an original grant? And all of those things bound together supersede.

We also have the fact that the Right-of-Way Act specifically addresses railways and how rights-of-way across Indian lands are addressed, whereas the ICCTA simply references federal laws. It has no reference whatsoever to what you do when you are dealing with sovereign land.

And that's where I would like to go next, is address how do we get here from there. And I think your questions are right on point, but they're answered, I think, by the sequence of events in this case as well as the other federal laws. And I will go forward.

THE COURT: Okay.

MR. BRAIN: This case is unique because we are dealing with a tribe. And, again, it's a sovereign entity. And the land we're talking about here is trust land administered by the United States. Those are very unique situations. Other federal laws, we don't have those situations. And I will show you a couple of them. But the courts have also, in essence, consistently held that "Ambiguities in federal law have been construed generously in order to comport ... with traditional notions of sovereignty and with the federal policy of encouraging tribal independence." That's the *Merrion* case, Your Honor. And it goes on to say, as the Ninth Circuit has stated, the "Courts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights. Any ambiguities in construction must be resolved in favor of the Indians. These rules of construction 'are rooted in the unique trust relationship between the United States and the Indians.'" And I think it's those principles, Your Honor, which take the IRWA and elevate it to, we mean it when we say it, with laws relating to Indians; we have to give them the benefit of the

doubt.

And the *Merrion* case, that was *Merrion v.* -- that case, it was in 1982, and in that case, it stated -- it was the *Jicarilla Apache Tribe* case. In discussing these cases, the dissent correctly notes that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax." And that was a taxation case. It was not having to do with what we're dealing with here.

But, here, the Swinomish Reservation was established by the 1855 Treaty of Point Elliott, and that treaty explicitly provided the right of the Tribe to exclude all non-Indian individuals and entities from entering the reservation. There is much discussion in BNSF'S pleadings about private contracts being preempted. I'm going to address that in more detail in a moment, but I want to emphasize that we're not dealing with a simple private contract here. We are dealing with a right-of-way granted by the United States Department of Interior. Also, as stated in *Merrion*, it states, "When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate powers to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry." Those initial conditions of entry here are the grant of easement under Title 25.

Unlike 10501(b), which makes no reference whatsoever to tribal lands, the IRWA has specific provisions, and I'm just

going to summarize some of those provisions to you that relate to railroads. 323 allows conditions to be imposed on railroads. And that's codified in C.F.R. 169.23 as well. 169.18 says one condition can be a limitation on the term of that grant. 169.20 provides for termination if the railroad breaches the conditions of the grant. Section 324 provides that it can only be granted if the tribe consents to the terms and conditions of the grant. 169.23 specifically addresses railroad grants and that the grants are subject to all of the rules and regulations under the guides. And 169.23 also provides for automatic abandonment if the rail line is not used continuously for two years.

There is no statement that abandonment under this Act is subject to the ICCTA or STB approval. There is no statement in the grant in this case that in any way is subject to ICCTA or STB approval. These points are contrary to the cases cited by BNSF related to private contracts.

Your Honor, in support of their argument, the railroad has cited to the Hazmat Act, and I want to address that briefly.

THE COURT: Okay.

MR. BRAIN: The Hazmat Act was adopted in 1990, and it states explicitly that it preempts, and I will quote, "requirements of a state or Indian tribe." Our position is that, clearly, Congress knew how to deal with legislation which could address the unique rights of Indian tribes, and it did so with the Hazmat Act by specifically addressing that. Moreover, the

IRWA and its provisions with respect to right-of-way grants date back to 1899. This statute has not been a secret. It's been out there. And there have been many grants that have been issued under it. And that date is set forth in C.F.R. 169.23. It's also discussed, and the history of the Act was discussed, in *Southern Pacific v. Watt*. And that was a 1983 case that resolved the *Andrus* case, which was the parallel case, or the ancillary case here, when the Court held that tribal consent was required. And I will quote from that case. "In interpreting the 1899 Act, we are guided by our earlier determination in this case that the Act was fully intended to protect Indian interests. We must also bear in mind that the construction of a statute rendered by the agency charged with its administration is ordinarily entitled to substantial deference." Again, these comments clearly indicate the significance of the IRWA and how it's to be interpreted.

In *Star Lake v. Navajo Area Director*, which was a 1987 decision, the chief administrative judge in that case addressed and discussed C.F.R 169.20 regarding the termination of rights-of-way. And in that case the judge was comparing the policy concerning rights-of-way for public lands as opposed to tribal lands. And here is what he said. "The Federal policy concerning termination of rights-of-way over public lands is embodied in Federal statutes, which specifically include an excuse provision." And if you will recall, in the *Star Lake* case, the railroad did not construct the line within two years,

and it was claiming it could not do so because of causes beyond its control, so it was looking for an excuse. The Court went on to say, "Federal policy concerning rights-of-way over Indian lands is also embodied in Federal statutes, none of which contain a provision analogous to the excuse provision in the public land laws. The failure of Congress to include such a provision in the Indian right-of-way statutes, when it has included one in the public land statutes, is reasonably construed, under rules of statutory construction, as an indication of intent on the part of Congress to deal differently with these two types of land."

Your Honor, I think that's the same principle you would use between the ICCTA and the IRWA. The bottom line is that if Congress had intended the ICCTA to preempt the IRWA, it should have and could have done so. It did not.

THE COURT: But we have no case that's on point with this one, where there was a separate contract, easement, agreement, or whatever, and the railroad breached the agreement, and the remedy included withdrawing the right-of-way, do we?

MR. BRAIN: No, we don't, Your Honor. And I suspect this will be that case.

THE COURT: Okay.

MR. BRAIN: But I will also say, we're not asking for the easement to be withdrawn.

THE COURT: You are asking for it to be complied with?

MR. BRAIN: We are asking it to be enforced. I think

there's a difference there. I think there's a big difference there.

I now want to address another issue, which I think is very relevant to this, because the case law supports this as also a reason why preemption does not apply, and that's the original contract grant terms, as opposed to a later restriction or amendment. The Tribe maintains that restrictions and conditions imposed in the original deed or grant to a railroad are not preempted by the ICCTA. And that is very significant because, first of all, BNSF, on page 3 of its reply, without any supporting citation, simply dismisses the issue and says, quote, "This original-versus-amendment contrast is immaterial." Of course, it basically holds and says that the IRWA is immaterial. But all of the cases cited by BNSF in support of its preemption are, one, cases having to do with state or local regulation, in other words, where a government, a subordinate government, not the federal government, has issued a regulation or law; two, they are state court claims, such as trespass or negligence, which are based upon state common law; or, three, they are cases where the preemption decision is based on a contract or amendment entered into after the original grant. In other words, you have a grant to a railroad, and later on you have an amendment which imposes restrictions, tariffs, or some other restriction. No case finds federal preemption of terms in an original grant of use. And I think that's very important.

Instead, BNSF, it's bell-ringer case, as you probably have determined, is *U.S. v. Baltimore*. Frankly, Your Honor, we think the case supports our position, and let me tell you why. First of all, the tracks were constructed in 1899. Apparently a lot of railroads were being constructed back at the turn of the century and prior. In any event, there was a restriction in the original grant that it could not interfere with the business of the owner. However, that was not the issue that was before the courts. There was an amendment in 1924, an agreement. That was not before the courts. It was the 1935 amendment which was the agreement that was at issue. And that was the situation where the owner of land, a company called Stock Yards, it was an entity which imposed a tariff on the delivery of livestock to competing yards serviced by the tracks over its land. The railroad determined that the fee was unreasonable, did not pay it, and therefore did not ship the livestock to its competitors. Well, the Court held that the railroad cannot engage in discriminatory conduct and Stock Yards could not compel the railroad to operate in a way that violated the ICC. Well, okay, but we're talking about an amendment. There was no such restriction in the original grant. It was a later agreement that they found. And, remember, this is an operating line where there was a later agreement.

There is nothing even remotely relevant in *Baltimore* to our case. I guess you could suppose that if the Tribe were to

construct a refinery on the reservation land and then ask BNSF to charge a tariff for shipments to Tesoro, to Shell, we would be in a parallel situation. But that's not where we're at. We are talking about an original grant which has restrictions on what BNSF can do.

Cases have consistently held that where the railroad has voluntarily agreed to conditions in the original grant, that those conditions will be enforced. For example, Your Honor, we have cited *PCS Phosphate v. Norfolk Southern*. Now, that's a 2009 case. So it's one of the more recent cases cited by anyone. And that was a situation where the mine owner had granted the railway a right-of-way, through deeds, which had a provision that required the railroad to relocate the railroad line if the land was needed for mine purposes. The railroad successor refused to move the line when the mine requested it. The Court discusses the ICCTA preemption. And I'm going to do several quotes from that case. "If enforcement of these agreements were preempted, the contracting parties' only recourse would be the 'exclusive' ICCTA remedies. But the ICCTA does not include a general contract remedy. Such a broad reading of the preemption clause would make it virtually impossible to conduct business, and Congress surely would have spoken more clearly, and not used the word 'regulation,' if it intended that result."

It goes on further to say, "As the STB has recognized, 'voluntary agreements must be seen as reflecting the carrier's

own determination and admission that the agreements would not unreasonably interfere with interstate commerce,'" citing the *Township of Woodbridge v. Consolidated Rail*, a decision which was an ICC decision.

THE COURT: But those were curtailing idling locomotives or who's going to pay for relocating a track.

I mean, the railroad's argument is, in the agreement itself, we said we cannot limit the number of trains into the future because we don't know what shipper needs are going to turn out to be down the line, and so there has to be something in there that says that we can run more trains, maybe larger trains in terms of numbers of cars, when shipper needs call for it, and you agree not to arbitrarily withhold your consent.

So when you say you are asking the Court to enforce the agreement, that is part of the agreement listed.

MR. BRAIN: And I will get to that, Your Honor. It is part of the agreement. But, remember, the restriction is, what can we do, what are the restrictions in there, and I'm going to get to that negotiation.

THE COURT: Right. You are talking preemption right now. I get that.

MR. BRAIN: I'm just talking preemption.

THE COURT: Yeah.

MR. BRAIN: But I'm also talking about original contract, because what they're trying to do is avoid that issue

and somewhat slide it under. And the important thing is, P*CS Phosphate* also said -- this was the holding in the case -- "We affirm the district court's judgment that the rail carrier is liable for the payment pursuant to a covenant in the original deeds of easement granting the carrier's predecessor-in-interest a right-of-way across the mine's property." Again, what we are talking about was, what was the agreement of the parties at the time the grant or the right was provided. We want the agreement to be held valid the way it reads, and that's all. And the issue of arbitrary is the only issue that then would be addressed, whether our failure to consent would be there.

I'm not going to go through the *Township of Woodbridge* in any detail, but, again, that was an expression by the ICC, and it basically said, "These voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce."

In our case, Your Honor, the original contract is the right-of-way, and it was executed in 1991. In its CR12(b)(6) pleadings, and you may recall this, BSN argued that the right-of-way was merely confirming its preexisting right to cross the reservation. Well, there was and is no basis in fact or law for that position. Prior to 1991, BNSF had no right whatsoever to cross the reservation. And it's pretty clear that they couldn't condemn it. They had no power of eminent domain over

trust lands, they didn't have any right to adverse possession, and they didn't have any right to a prescriptive easement. BNSF now alludes to and alleges that the Tribe did not prevail in the litigation; in other words, that there wasn't a final decision that we actually could exclude them.

That position has no merit because if you look at section C and D of the right-of-way, it states that the easement -- and I will quote from section D -- "over any and all lands comprising part of the Swinomish Indian Reservation and held in trust by the United States for the benefit of the Tribe over which the existing railway of BN passes."

This statement is a clear admission. Because it's a right-of-way. It's not a simple contract. It is a government grant by the U.S. as the trustee. And, again, the Tribe had to consent.

As stated again in *Merrion*, "Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose." And those are the limitations in the right-of-way.

The Tribe submits there are no material issues of fact. And BNSF basically agrees with that, but raises two alleged issues of fact. The first is the meaning of the term "arbitrary." They take the basic position that arbitrary, if what they're doing is legal, then for us to object to an increase of what they are

doing is, per se, by law, arbitrary.

They also state that whether the Tribe would have -- they also question whether the Tribe would have consented if it knew the condition regarding use could be eviscerated by common-carrier rights. As to this consent, there is no evidence that the Tribe would have consented to different terms, number one; two, there's substantial evidence that the Tribe continually objected to and rejected compromises to its position. But as to this issue, the issue of consent, we are seeking to enforce the terms as they're written. And the speculative allegation as to what the Tribe might have consented to, had it known the truth, is irrelevant. We're looking at the contract terms that are there and saying, these are the terms that must be enforced. As Chairman Cladoosby stated in his deposition, a deal is a deal is a deal. And that is this deal.

As to arbitrary, Your Honor, there is no evidence to support BNSF's position. It is a legal argument, and a legal argument distilled down to what it really means, is that any refusal by the Tribe to a shipper request which is not illegal is, per se, arbitrary. That renders that entire provision superfluous, meaningless, and irrelevant. There's no point in having any kind of restriction in there because, by their interpretation, any time there's a legal request, you can't refuse. And if that's what was intended, that's what it should have said.

To be clear, the Tribe requests that the right-of-way be

declared valid, that all of its terms and conditions be enforced. BNSF requests that any restrictions be deemed meaningless and superfluous, as indicated.

THE COURT: So your position is, the Tribe can take a position that's inconsistent with the Hazardous Material Act, and that could still be a valid reason to reject a request?

MR. BRAIN: Your Honor, our objection to this request is not merely because it's Bakken. Our objection to this request is because it's a five-fold increase to Tesoro. And if you add Shell, it's another four. And we built our economic center based upon the understanding that there would be a limitation in this easement. And, indeed, the issue of the economic center is discussed both in the settlement agreement and in the grant of easement. And it's there for a reason. It's there because we're concerned about all this stuff. And why else would it be there?

And let me address the Hazmat. That issue is not before us. It's there by example, and we use it by example because the government knew how to address tribal rights. But the Hazmat Act has no case interpreting where the original contract -- I think it's very possible, Your Honor, that if you owned 1,000 acres and you agreed that a rail line could cross your property, but you restricted it to only passenger service, and that was the grant that you issued, and the railroad decided it wanted to ship hazardous materials instead of passengers, would the Hazmat Act trump that? I don't think so. We don't have a case on that, but

I don't think so.

But I do want to point out, it's not just Bakken crude. Yes, that is a concern. The Tribe was concerned about that. And does that support its decision to refuse? Yes. Is it the exclusive decision? No, not at all.

Your Honor, I want to briefly go through the facts and then get to the critical point of the negotiation, because I think those issues add the context as to why this agreement reads the way it did. I don't think there's any question that the history clearly establishes that the railroad was trespassing without permission and that the Department of Interior and the BIA recommended action be taken to enjoin the construction, but nothing happened. Basically, as we know, the Tribe did not get much of a voice back then.

In 1935, Great Northern admitted that there was no documentation whatsoever to document the fact that it had a right-of-way over the reservation. In 1970, the Tribe wrote to BN, and it said that there was no grant of a right-of-way and you are trespassing. And that instituted some negotiation.

In 1977, they attempted to come to a resolution, but it didn't happen, and the Tribe requested that the U.S. Solicitor commence an action to remove BN. In August, there was a letter from the superintendent to the area director, and he recommended that it be reviewed by the solicitor. And there was the writing on the wall to BN. And so how did it deal with that? It filed

for its own right-of-way application with the Department of Interior, trying to circumvent the action by the Tribe and the BIA. And the letter that was issued in October of 1977 by the BIA states that the BN application was lacking under C.F.R. regulations because the landowner tribe did not consent. That started basically a sequence of events which went on for the next six years.

What happened in October, after that, is that NARF wrote a letter, a memo, to The Western Agency, and that was the memo that talked about travel consent is necessary.

In December of that year, the Tribe passed a resolution that said, the last offer of the railroad was $150,000, which was inadequate for 87 years of trespass, and it requested that the United States bring an action to eject.

In the summer of 1977, we know that the litigation was filed, and BN answered.

In October of 1978, the Tribe passed another resolution which acknowledged the BN application, and it specifically refused to authorize the Secretary of Interior to grant the right-of-way. In other words, it was on record, we don't want that right-of-way, we're not going to grant consent. And it urged again the U.S. to remove BN as a trespasser.

In October of '78, there's a letter from the superintendent -- and this letter is the one that denies the application because there was no tribal consent -- and it

acknowledges the October 3rd resolution I just cited.

In November of 1978, BN appeals to the superintendent, and the sole issue is the claim of consent. In other words, we don't need your consent. In December, the Tribe responds, it says consent is required, and there is no consent granted.

In 1979, May, there's the decision by the area director. He again affirms the superintendent in that tribal consent is required. In May of 1979, BN appeals to the assistant secretary of Indian Affairs. In September, there is a decision by the acting deputy, and he says, very unmistakably, that 25 U.S.C. Section 324 requires tribal consent and therefore it cannot grant a right-of-way as the Tribe has not consented.

In October, BN files the U.S. district case against Andrus and other Department of Interior individuals, and it asks for declaratory relief and to compel issuance of the right-of-way. Interestingly enough, it does not name the Tribe as a party.

In February of the following year, the Tribe is allowed to intervene. The judge in October of 1980 denies cross-motions for summary judgment pending the resolution of the *Southern Pacific* case. And at that point not much happens on the underlying case, because if consent is not required, then the trespass case is going to go away. If consent is required, then the trespass case has to be dealt with.

As we know, in March of 1983, the Ninth Circuit issued the *Southern Pacific v. Watt* case, and held under the 1899 Act that

consent by the Tribe was required. That was appealed by BN, and in February of 1984, the appeal was dismissed.

Now, BN really doesn't address the issue of consent in any of its pleadings. But that is a very key issue here, because if the Tribe has to consent to the grant, then it has to consent to the original conditions that are imposed by that grant which are authorized by the IRWA.

Ultimately, in 1986, settlement discussions began, but they really didn't get down to the bottom line until the summer of 1989, and then there's a fairly short period of time with the critical terms of negotiating, and those critical terms did not include money and they did not include the term; they had to do with hazardous materials and they had to do with the number of trains crossing the reservation and the number of cars per day.

And at this point, Your Honor, if you will recall, we put in, as Exhibit 30, a concept site plan. The reason I put that in there is to confirm that the Tribe was indeed going forward with the project, and, in fact, it had obtained a grant from the government to proceed with an economic development plan.

Okay. Now, we're going to go through what I consider to be the critical letters. In June of 1989, the Tribe wrote and at that point in time it requested that any settlement agreement have the language which BNSF relies upon, and that's the language that says that it shall comply with TEDRA law. But BNSF always fails to quote the sentence that follows that, which states as

follows: "Specifically, the annual rental shall not be less than that required by federal law in effect at any time during BN's occupancy of the right-of-way. BN shall comply with all applicable federal laws and regulations pertaining to BN's activities within the Swinomish Reservation." Clearly, the whole point of it was to protect the Tribe's interests that BN would comply with the hazardous hauling and the payment to it.

But let's go to the June 8th letter draft. And, Your Honor, this is Exhibit F. It's actually one of the defendant's. We put a copy in, but our draft was very hard to look at. And I will put it on the overhead here. It should be on your screen. This is the draft of the right-of-way agreement that was being circulated on June 8th of 1989. And if you look at section b, the pertinent statement by the Tribe was, "Burlington Northern will inform the Tribe in advance of the names of the shippers and the contents of railroad cars crossing the Reservation lands."

With respect to the number of cars, the draft at that point in time said, "Burlington Northern agrees that, unless otherwise agreed in writing, only one westbound and one eastbound train, of 25 cars or less, shall cross the Reservation each day." There is no provision for the revision of that. It's an absolute restriction.

What happens is, BN gets this, and, of course, they're concerned about it. And the point I want to make here is that

there are two concerns which the Tribe is addressing. One of those concerns is the hazardous materials; the other is the number of cars and trains.

If you go to Exhibit 32, that's the June 22nd, 1989 letter from Mr. Silvernale, and he specifically addresses the June 8th drafts. And what does he say? If you look at his letter -- and I have got the section -- it basically addresses section b, 7b and 7c. If you look at 7b, I quote, "I do not believe that we will be handling any exotic materials to and from the refineries, but we have no objection to making a disclosure to the Tribe as to the nature of the commodities. We simply cannot provide this information on a shipper and car by car basis in advance of shipment since we do not have the knowledge until the train is actually made up, just before departure. I am sure that you are aware that all cars handled have to be classified, packaged, and loaded, in accordance with the DOT-FRA Rules and Regulations. These rules and regulations for handling hazardous materials have been developed for more than 140 years and as a common-carrier railroad, Burlington Northern is obligated to handle such cars properly classified, packaged, and loaded to all destinations." That is the only time the word "common carrier" is used in these negotiations in the written document, and it refers only to hazardous materials crossing the reservation.

If you go to the next paragraph, where he addresses Section 7c, and he says, "We cannot agree to a single train

limitation, or to a limitation on the number of cars. At times, depending on business at the refineries, we must have flexibility with regard to the number of cars, which may exceed twenty-five or thirty. On occasion, I can imagine that more than one movement will be necessary depending upon a number of factors in railroad operations. It seems to me that our current level is one train each way per day. If more trains should start operating (which we doubt) it would seem to me that this could be the subject of a rent adjustment based upon the greater burden to the property adjacent to the right-of-way."

Your Honor, in its pleadings, BNSF implies that the Tribe has an adequate remedy at law because the whole intent was that if there were more trains, we get paid more. But the negotiations don't go that way. I bring that as a segue, because that has been segregated off out of this case, but it's important because these negotiations address a number of issues.

But let's go to, then, this next letter, which is Exhibit 33. That's a July 10th letter from Mr. Silvernale. And it's pretty clear that between June 22nd, that letter, and July 10th, there were a number of negotiations, and the parties are in the process of dealing with the languages for those two sections.

In the July 10th, 1989 letter, by the way, there's just two paragraphs, and it addresses just those two provisions. It says, on 7b, "Burlington Northern will keep the Tribe informed as to the nature and identity of contents of placarded cars crossing

the Reservation." And, basically, it's periodic, and this is what the parties basically agreed to. You will note that there is no statement about shipper needs or common-carrier obligations.

If you will go to the next paragraph, that's the operative paragraph that we're talking about here. And look at that paragraph. That is substantially what was agreed to by the parties in the right-of-way agreement. But there's something missing. You will note that there is nothing in this paragraph that references that if the trains are increased, that there would be compensation for the increase. The Tribe did not agree to that.

The final document -- and I will get to the final document in a moment. But I think that it's very important, Your Honor, that what you have here is a situation where, on June 22nd, the railroad says: Guys, we can't agree to these terms, and here are the reasons why. We have common-carrier issues related to the types of products we're shipping, and with respect to the number of trains, it could be that we need to do two trains on a day, or something like that, but we can try to work that out. So on July 10th, they get back, and they said, well, we couldn't do that then, but here is what we can do.

There's no restrictions on reference to the ICC, there's no condition that said, you know, we don't know if we can do these conditions, we need to get prior approval by the ICC, so whatever

we agree to is contingent upon their approval or any of those alternatives.

BNSF, in its reply, cites to a case, *State v. Farmers Union Grain*. It's a Washington case. It has to do with interpretation of contracts. And the quote they take is, "Parties are presumed to contract with reference to existing laws." We agree. So when BNSF said we can't do it because of these reasons, on June 20th, and then on July 10th said, but here is what we can do, we're entitled to have a reasonable expectation that they knew what their limitations were, and they didn't provide us anything that would give us any intent otherwise.

So what the parties did is they entered into the right-of-way agreement. And I have Section 7C from the right-of-way agreement up there. And as you will see, the first part of that is as suggested by Mr. Silvernale. Now, one thing that nobody has addressed, at least BNSF has not addressed, is the beginning of this paragraph. And it says, "Burlington Northern agrees that unless otherwise agreed in writing ..." There is no agreement in writing, Your Honor, to have any condition. There was no request in writing. We're here -- and as you know, BNSF made it very clear to you last year at the 12(b)(6) motion that it had no intention of stopping these shipments.

It's our position -- and, again, I want to address this -- but the next sentence down there, that you have to have an agreement to the additional number of cars before there is any

annual rate adjustment.

THE COURT: But, Mr. Brain, I think we are really getting too much into the weeds here.

MR. BRAIN: And I -- let me go on, Your Honor. And I understand that. But I want to just summarize a couple of things.

THE COURT: Okay.

MR. BRAIN: One, after this, it's BN who makes the application to the Department of Interior. It's BN who represents that this application is made pursuant to the IRWA. It's all of their application, and it's the Tribe consenting to it, which allows this 1991 document to be passed.

Now, let me go on to a few of the cases and subjects that are addressed in the BNSF materials. First of all, with respect to the trespass cases, Your Honor, do you have any specific questions as to the cases they cited there?

THE COURT: No.

MR. BRAIN: Okay. I won't go into them in depth. I just want to point out that, as to the trespass cases, they all had to do with state issues, state law issues, or state laws. They're not federal.

As to the Surface Transportation Board cases that were submitted by BNSF, it's interesting, Your Honor, we had prepared almost the identical pleadings we were going to file, but they beat us to it. So we were going to file the same thing. We

believe that those cases actually are on point in our favor. Neither of the cases address another federal law or preemption of federal laws. That's very clear on the face. Neither address the IRWA or tribal rights. And both involve state law contract claims. And I can go further, if you want me to, on those cases.

THE COURT: No. Let me ask you a question, Mr. Brain. They're not parties in this case, but shipper needs is part and parcel of what the Surface Transportation Board is about; it was what the Congressional Act was about. There's a recognition that this country needs its economy to stay on course by having common carriers service shippers' needs and customers' needs in a way that we're not interrupting the flow of important materials, whether it's pipelines, whether it's railroads, whether it's highways, or things like that. And, you know, I'm not saying I don't have a great deal of, you know, sympathy and empathy for the Tribe's position. It's not the first time they can look back and say, I thought a deal was a deal was a deal, when it wasn't. That's been the history of how they have been treated for centuries in this country. But there are serious issues that go beyond what Mr. Silvernale wrote in a letter and how somebody interpreted it that have to be looked at here. Is Burlington Northern in breach of their agreement? Quite possibly. Is the Tribe entitled to damages for that breach? Almost definitely. But can this Court order the injunction that you're asking for is what I need a little bit more discussion about.

MR. BRAIN: Okay. I think you can, and I will tell you why. First of all, it's equitable relief. And, number two, the IRWA specifically provides that if there is a material breach -- and I think we have a material breach here -- then it can be terminated. So if indeed the Department of Interior can terminate this contract, I would say, Your Honor, you are completely within your authority to enforce this contract.

THE COURT: Right. But do I refer it to the Secretary of Interior to decide whether she wants to terminate the contract? Does the Tribe get to make that decision unilaterally without any input? Do I get to make the decision unilaterally, anticipating that this is what the Secretary of Interior or the director of the BIA would want? You know, that's what I'm asking.

MR. BRAIN: Well, except -- remember, we're not asking for termination. We're simply asking for specific performance. And what I'm indicating here is that if there is a right to terminate, that is a very strong power.

THE COURT: Okay. So you are saying we're not asking for termination, we're asking for the agreement to be enforced.

What type of order does this Court give that says to Burlington Northern: Live up to your agreement? They will say, as Mr. Keehnel said in his brief, you can't extort from us an agreement to do something illegal, like not service the needs of our shippers, as long as we're complying with regulations, Hazmat

laws, things like that. And, you know, maybe we're in breach because we didn't give prior notice, maybe we're in breach because we didn't do it in writing, maybe we have to pay some damages for not increasing the amount of rentals; do to us what you will, Judge, but don't tell us we can't live up to our responsibilities as a common carrier.

MR. BRAIN: But the ICCTA doesn't say property rights, whether they be private or tribal, are trumped. It doesn't say that railroads can go across your land, whether they have a grant to do so or not, and once they have done so and they have their foot in the door, and you say the conditions of your foot in the door are X, Y, and Z, that those can't be enforced. If, indeed, it goes to what they're saying, there are no private property rights, and there are no restrictions on rights-of-way across tribal lands.

THE COURT: I'm not concerned about private property rights, because that's not here. I mean, you're absolutely right --

MR. BRAIN: I understand.

THE COURT: -- the Tribe has many, many more rights than a private property owner has.

MR. BRAIN: Right.

THE COURT: And, you know, the fact that it's trust land should be considered differently than some of the cases that have been cited to me by Burlington Northern that deal with, not just

private property owners, but even states. This is a different situation, and their tribal rights need to be respected, the treaty rights need to be respected. But there still needs to be some sort of -- you know, you are asking the United States District Court judge to do what and under what authority?

MR. BRAIN: So, Your Honor, let's step back a little bit. Let's assume that there was no grant of right-of-way and let's assume that you were sitting in Judge McGovern's seat back in 1989 and this went to trial and you determined that they were trespassing, and let's assume you found that they were only trespassing over 100 feet, not the whole 4,000 feet. It doesn't make any difference whether it's a foot or 4,000 feet. You can't trespass.

THE COURT: Okay. And maybe the Tribe got snookered into an agreement that they didn't have to make and maybe, in retrospect, shouldn't have made. But once they make it and they allow it, it's a different case to try to take it away than it was back before Judge McGovern.

MR. BRAIN: But, again, I'm talking about the authority of the Court. What I'm saying is that at that point in time, if you were sitting there as the judge, you could have held that they were a trespasser and evicted them.

THE COURT: I could have, right. But that's not what you are asking me to do.

MR. BRAIN: No.

THE COURT: You are asking me to enforce the agreement.

MR. BRAIN: I am.

But the point being is, to get the right to cross, just like the cases I cited, *PCS Phosphate*, all the other cases, you had to agree to certain restrictions. One of those restrictions is that if you requested more traffic, we had the right to say yes or no, because we're building our economic center there, and if we said no, the standard to which we were to comply was whether that "no" was arbitrary. And, Your Honor, I think that can be specifically enforced, and it really gets down to that.

THE COURT: All right. Let me hear from Mr. Keehnel.

MR. BRAIN: That's fine.

(The Court and in-court deputy confer.)

THE COURT: Okay. Mr. Keehnel.

MR. KEEHNEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. KEEHNEL: For the record, Stellman Keehnel for BNSF.

I don't want to relitigate the prior case. It sounds like that's what we were doing here during part of Mr. Brain's presentation. There's been a settlement. I'm not going to stand here and say that anybody is happy with what has turned out as a result of that settlement. The Tribe may be looking backwards, wondering if it should have done what it did. I think I'm not being out of line here to say that agreement maybe could have been written more crisply than it ultimately was written, but I

think it is adequate for its purpose, and I am going to, I hope, help you today try to figure out a way to both enforce the agreement and be consistent with Congress's dictate on the ultimate primacy of interstate commerce, of protection.

Let me start with three features that I think have gotten a little overlooked in the minutia of we have been digging through. First, while we explain in the briefing that the remedies that the Tribe here is seeking are preempted by ICCTA, it is an injunction permitting the 25 per day, and there's also, tucked into their request for relief, an injunction against the movement of any Bakken crude whatsoever across the reservation. While we think those are preempted remedies, the real fact is that the plaintiff here has the remedy. They have the right to go to the STB. They could petition the STB even to go so far as to take this segment of line off the National Rail Network. And they may some day go to the STB and petition to do that. But the fact is that they have a forum and they could approach it. We're not asking you just to say, forever and anon, you are stuck with the Burlington Northern tracks in your backyard.

The second point that I think has been overlooked, we're not trying to get something for nothing here. In a way, we're in the middle, right? We have to satisfy the shippers' needs. Congress imposes that on us. The regulators enforce that against us rigorously. On the other hand, we understand that traffic has increased -- of course it has -- and Burlington Northern is

prepared to pay for that under the terms of the agreement. The parties have gotten a little crossways on that at various times. We have tried to make some of that up to them with some periodic payments. I can't even remember, as I stand here today, Your Honor, whether we informed the Court of that. But that has been done. We're prepared to figure out a solution to that going forward.

Third, an overarching point that I think has gotten lost a little bit -- actually, I thought it had gotten lost a little bit until some of the Court's questions to Mr. Brain a moment ago. But the point I was going to make, and I guess I will still make it, is the National Rail Network really is the economic spine of this country. It has unique importance. It was fundamental to the building of this country. It's still fundamental to the operation of this country every day. It's something that kind of gets overlooked because it's part of the foundation, and it's a little bit underground in that sense. But it's not an overstatement to say the country is built on it. That uniqueness is reflected in 10501(b)'s provision of ICCTA. That is truly unique. That is very unique, because unique is unique. It is unique, Your Honor. We can't find another federal statute that purports to preempt other federal statutes. This has nothing to do with state-federal relations and the whole body of law where preemption is looked at with a very scrutinizing eye because of the constitutional implications. This is Congress in 1995

saying, what a mess we have got going on in this country. Here is what we're going to do: STB, you've got complete jurisdiction. Every other federal law that might get in the way is now out of the way.

Why aren't tribes singled out? Well, why aren't any of a dozen agencies singled out? Why aren't a dozen or more, maybe hundreds, of statutes singled out? There would have been a laundry list, you know, as long as your and my arms combined.

THE COURT: But they did single out the tribes in the Hazmat Act, so they know how to do it.

MR. KEEHNEL: Yes.

THE COURT: You can't compare an Indian tribe established by treaty to just another entity, state, or locality. I mean, the tribes have sovereign rights that have not been respected for a long time, in this country in general and this state in particular. And it's kind of ironic that it was 1889, when we became a state, that all of this happened. But, you know, you see the letters to the U.S. Attorney -- you know, stop them, do something -- and, you know, the concept of getting railroaded, that word didn't come out of nowhere. The Tribe got railroaded. And now they're a little bit more assertive about, hey, we're not just another contracting entity, we're not just another state, we're not just a local government, we're not, you know, some kind of entity that you can override. We have very specific treaty rights. The railroad was told in the 19th

Century, you can't do what you want to do without an act of Congress because it's an Indian tribe.

And I agree with you that the National Rail Network has unique importance and is an entity that has to be considered in here, but don't tell me that Congress preempted everyone when they said federal laws. They didn't preempt certain Indian rights.

MR. KEEHNEL: I will come back to that. And I'm not saying they preempted certain Indian rights. But we will get into that. I'm just making the overarching point here of the importance.

THE COURT: Okay.

MR. KEEHNEL: I will close up this point and move on.

When the Tribe contracted with Burlington Northern, it was dealing with a private entity. A private entity that, even if it had wanted to, was powerless to, to use the Tribe's words in its brief, compromise the national policy. Burlington Northern had no right, power, ability to compromise the national interest. It can't speak for Congress. It can't speak for the nation. It can only speak for itself.

The 1948 holding of the U.S. Supreme Court in *Baltimore & Ohio* matters here, the *Baltimore & Ohio* case, the one that Mr. Brain referenced and that is sprinkled throughout our briefing. We don't have the power. My client did not -- my client's predecessor did not have the power to contract in a way

that would derogate from its common-carrier obligations. It just did not.

All right. Let's talk about ICCTA and the statute that really is, we think, at the center of this. That's 11101(a), the common-carrier duty statute. You have seen how we have a common-carrier duty. It's understood. I'm not going to read the statute to you. But the point is, if we were to read 7c, 7c of the easement, as the Tribe is proposing that we read it, that is, that even when there's a shipper demand increase that it's not arbitrary to then just say no -- just for no reason at all, or any reason at all, just say no -- if we were to read it that way, that provision of 7c, that subpart of 7c, would be illegal. There's no plainer way to say it. It would be an illegal clause, an unenforceable, illegal clause.

Our briefing charts how you don't have to find that it's an illegal clause. And over the last couple of days, in trying to absorb the briefing and trying to help the Court, as opposed to just add to your woes in dealing with, I'm sure, what is not a very easy case for you, I looked at the definitions of arbitrary that were rolled out by the Tribe in its briefing. I can't disagree with them. The core definition they have there is, it has to be principled. How can forcing someone to do an illegal act be principled? It's not. It's arbitrary to purport to require the Burlington Northern Santa Fe Railway now to commit an illegal act by going to its shippers and saying, 25 a day, that's

it. So there is a way to logically, I think properly under Washington rules of contract construction, read 7c, not find it illegal -- and, you know, the Tribe isn't going to be happy about this -- but require that we be allowed to then move that traffic.

Mr. Brain went on about the exchange of letters. We put those letters before the Court because we wanted the Court to be aware that the Tribe was fully on notice of what our common-carrier obligations were. I don't think there's a question about that. And it's not that the party wasn't acting as a sophisticated party. The Tribe's own words, in their opening brief, at page 13, line 14, "Both parties were sophisticated going into these negotiations."

Mr. Brain suggests that because the limitation, as they read it, is part of an easement going in, that they can just say any restriction applies. But we know that that's not the case. We know that *Baltimore & Ohio* says exactly the opposite. Just because it's an easement doesn't mean our common-carrier obligations can be erased.

We're going to have to grapple with preemption. I want to talk a little bit in general terms now, and then I want to try to figure out how to help you make it work with IRWA. If you disagree with me ultimately, which I hope you don't -- if you disagree with me and say that it would be arbitrary for the Tribe to say no to more than 25 -- but if you do, you are going to have to grapple with IRWA and ICCTA preemption.

The clause that is preemptive there, that reads, quote, "The remedies are exclusive and preempt the remedies provided under federal or state law," close quote. I mean, truly, Your Honor, it's extraordinary. We looked hill and dale for something similar to that. It's just not out there. It is extraordinary. There is no great case law that's going to help you interpret that because you are treading on untrodden ground. And it's not as if Mr. Brain doesn't understand that, read literally, those words mean that, indeed, the remedies he seeks are preempted. That's why in his brief, page 26, line 23 of his reply, he argues against taking the ICCTA federal preemption language literally. He understands, the Tribe understands, that if you interpret it literally, then the remedies that the Tribe is seeking simply cannot be granted.

Your Honor, there isn't a principled basis here. I mean, that state-federal body of constitutional law regarding preemption just isn't going to help you. You are dealing with a statute that is, yes, broad, but emphatic, and it uses plain language. I mean, our Supreme Court now for decades has been saying, when the words can only be interpreted one way, you have got to enforce them even if you don't like the result. For example, in the *Hartford Underwriters* case, 530 U.S. 1, I'm going to quote -- just for a second to page 6 -- a unanimous court decision, "We begin with the understanding that Congress says in a statute what it means and means in a statute what it says

there. When the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms."

There's nothing absurd here about plaintiff being required to go to the STB to seek the relief that it's seeking in this court. That's what this court -- the cross motions are asking you to decide, can you apply the remedies that have been sought by the Tribe? Injunctive relief. I think the answer to that is -- and the STB is deferring to you to make that decision on preemption -- the ball is in your court. And I think the statute is clear. But that doesn't leave the Tribe without a remedy. It can go to the STP and say, come on, let's get real here. I don't think you should have to go that way because I think you should find that the provision is enforceable and the injunctive relief isn't necessary at all.

I'm going to talk about the Hazmat Act. Its importance in this case is not reflected by the degree of briefing. It's not as complicated as a statutory scheme. We didn't spend much time on it. The Tribe's briefing, frankly, was more extensive than ours, but I want to spend a few minutes today to flesh it out, because I think it also gives you an alternative ground to grant our summary judgment motion.

The Tribe has responded to our argument regarding the Hazmat Act by saying, but wait a minute, we, the Tribe, didn't enact a regulation, we just have a contract restriction. That's what is

parroted in the language of the statute itself. 49 U.S.C. 5125(a) does not speak in terms of regulations. It speaks in terms of, quote, "requirements," and it speaks specifically to requirements imposed by an Indian tribe. If there's a requirement imposed by an Indian tribe that impedes the movement by a railroad of regulated hazardous material, it is preempted. I don't want to oversimplify, but it really is that simple. The fact a requirement is much broader than a regulation is underlying. Compare, when you get a chance, 5125(a), which just refers to a restriction, which we're relying upon, with 5125(b). It's about five lines down below 5125(a). It uses the same word, "restriction," but it precedes it in this way. 5125(b)'s preemption clause reads, quote, "a law, regulation, order, or other requirement." So we're not talking about law, we're not talking about a regulation, we're not talking about an order. We're talking about some requirement imposed by a tribe. How do you impose a requirement other than those other panoply of ways? Through a contract. Now, in 5125(a), when Congress is using "requirement," it's not using it differently from 5125(b). You don't get to substitute "regulation" for "requirement" in 5125(a).

Equally important for understanding the effect of the Hazmat Act is that the trigger for 5125(a) causing preemption is the, quote, "requirement," close quote, quote, "as applied or enforced." "As applied or enforced." So if the Tribe has a

requirement -- it could be a contractual requirement -- and the enforcement of it is going to restrict the flow of Department of Transportation-regulated hazardous materials, the statute says, Tribe, in this instance, the national interest is going to predominate over the tribal interests; the materials are going to have to go through. And I understand that the clause itself doesn't speak specifically to Bakken crude, but that's what is being restricted now. And that's why "as enforced" is important, because "as enforced", as the Tribe would enforce its reading, it would restrict the flow of exactly what the Department of Transportation statute says thou shall not restrict.

THE COURT: Even if there are restrictions in that area, why would other contract rights be preempted, such as monetary damages, and, you know, the other panoply of contract rights, other than injunctive?

MR. KEEHNEL: I understand. It's no secret we're -- we started thinking about what the consequences of this are. We know we're going to face that. And you're not being called upon to decide it today. But you are correct to look down the road and understand that there are implications to this. We understand that.

We cited the *Roth* case. It's really the only case that has interpreted the board requirement in the context of the Hazmat Act. It's actually interpreting 5125(b). So it didn't have the benefit of the "as enforced" language that's in 5125(a), which

makes its preemption provision even broader. But what's interesting about the *Roth* case is that -- it's a Third Circuit case; it's the sole case, as I said, that's interpreted this -- it came out exactly where we think a logical reading of the Hazmat statute comes out. It says specifically that, in this instance, court enforcement of a tort claim would have the effect of essentially restricting in the way that 5125(b) defines restriction, and therefore, the tort remedy was precluded. The state law tort remedy was precluded. It was in a personal injury case. You know, it's such a crisp statute ultimately that -- I'm not going to apologize for the amount of briefing that's in front of it. I am afraid it's possible to overlook it. I think it's really important. And it's also important to note that it's not like the Tribe doesn't have an alternative remedy here too. Assuming the court agrees with me, the Hazmat Act is also preemptive here, 49 U.S.C. 5125(e) includes a way for the Tribe to go and seek a waiver from the Secretary of the Department of Transportation for the preemptive effect.

THE COURT: So let's get back for a second, Mr. Keehnel, with the Indian Right-of-Way Act. Because, you know, you want to talk about the ICCTA, the Interstate Commerce Commission Termination Act, saying, don't pay attention to any other state or federal law. This is 1995 Congress saying, from henceforth forward, only consider common-carrier needs and shipper needs, because the railroads move the product that makes the country

work. And so the Indian Right-of-Way Act, forget about it; treaties that gave the Indians the right to bar their land to certain people under certain circumstances, forget about it. Just look at these two things. That's a big statement.

MR. KEEHNEL: That's an overstatement of our position, Your Honor.

THE COURT: Okay. So what does the Indian Right-of-Way Act have to say about this situation?

MR. KEEHNEL: I think the Indian Right-of-Way Act has a lot to say about this, about our general situation but not specifically about what's in front of you now, and there are several reasons for that. IRWA really deals with the going-in process and the getting-out process. It says, look, if you are going to give a right-of-way over tribal property -- and, obviously, Burlington Northern still contests whether it's on the Tribe's property. When it made the application, it says, the Tribe claims the property. We don't ever acknowledge that it owns the property. I hope we don't have to go litigate that again. So consent does have to be secured. Yes, consent has to be secured. If there's a breach, then the parties can go to the Department of Interior and request cancellation of the right-of-way. Going in, coming out. It doesn't have a lot to say about what's in front of you right now. What the Tribe's argument is, somehow, because of its reading of the way the conditions are stated in 7c of the easement, that it's

essentially been sanctified. Here is why not: The Tribe would admit today that, given the regulation that several years ago BIA itself adopted that said all grants of easement are subject to all other applicable federal laws, the Tribe wouldn't argue to you today that if the easement were entered into today, it wouldn't be subject to the preemption of ICCTA. It would say yes, because our regulation says it's subject to all other applicable laws going in.

But think about the history here. The *Merrion* case is decided in 1982. The U.S. Supreme Court at that point said that while the Tribe, quote, "has the sovereign power of determining the conditions upon which persons shall be permitted to enter into its domain, that is provided only such determination as consistent with applicable federal laws," close quote.

The recent adoption of the regulation by BIA is merely recognizing that. And indeed, as you saw in our papers, BIA has confirmed, in both court proceeding and in its preamble to the adoption of that regulation, that this is just business as usual, that we understand that every time an easement is approved by the Department of Interior over tribal lands that it is subject to all applicable federal laws. And that's ICCTA.

You don't have to say that ICCTA preempts IRWA. You just have to read them together. And reading them together, BIA and the Department of Interior have always recognized that when it grants an easement, it is subject to those common-carrier

obligations. It is not arguing otherwise. It didn't when it was challenged on the regulation that it adopted. It said that this just confirms what we know.

THE COURT: Mr. Keehnel, I hope you consider how infuriating it is to the Tribe to hear you say that Burlington Northern still doesn't concede that this is their property. Why do you need to say it? I mean, why do you want to provoke this?

MR. KEEHNEL: I'm not trying to provoke anyone, Your Honor.

THE COURT: Yeah, you are. I mean, you are saying, yeah, we paid you a couple of hundred thousand dollars and, yeah, we signed this voluntary easement thing, but, you know, we're not saying you have any property rights here at all. You don't need to say it today. I doubt it's true that you can prove anything like that. And it just makes the Tribe feel like, you know, they're so disrespected and so dishonored that it takes it out of the realm of can reasonable minds agree or disagree about what this means into, you know, those damn Indians, they're always trying to take stuff they're not entitled to, and, you know, it's time for us to shut them down, or something like that. I know that's not what you mean.

MR. KEEHNEL: Of course not.

THE COURT: It's conveyed by when you take that position. It's waving a red flag in front of these people, and it just doesn't need to be waved.

MR. KEEHNEL: My apologies. I'm not trying to be inflammatory here.

THE COURT: Okay.

MR. KEEHNEL: I haven't a clue whether the track is on Burlington Northern -- or Burlington Northern's operations are on the Tribe's property or not. I didn't litigate that case, you know.

THE COURT: And so we're all assuming it is. That's the point. And let's just assume it and move on.

MR. KEEHNEL: So can we just -- so I don't know. Anyway, let's move on.

I don't want to lose sight of the point where I was, And that is, in adopting the C.F.R., the BIA itself says it's just clarifying, it's just confirming, it's not doing something new. I understand it's a new regulation. I understand the Tribe's argument there. But the fact is, in light of *Merrion*, a 1982 decision, it couldn't have been any other way.

You know, it's not like an easement itself doesn't recognize that all of this is subject to the panoply of federal law. That was the whole point of the settlement agreement clause saying, in the easement, this is not going to set aside any federal publications that the parties have.

We did submit the STB's recent decision on the Tesoro petition. You have that now. Obviously, the STB has asked us to get a message to you. I guess that was the whole point of how

they concluded their ruling, where they wrote, quote, "In ruling on the preemption issue, the Board notes that the Court may" -- meaning you, Judge Lasnik -- "may be guided by the Board's recent decisions discussing the interplay between 10501(b) preemption and contract law." And then it cites two of its own September 2016 decisions. Those referenced decisions embrace the rule that ICCTA can preempt enforcement of contract terms that unreasonably interfere with rail transportation.

It was interesting that Mr. Brain wanted to talk about the *PCS Phosphate* case because one of the decisions the STB recently made, that it asked you to look at, says this about *PCS Phosphate*. It's the *Union Pacific* decision that the STB asked you to look at. "There is precedent that a state court decision applying contract law could unreasonably interfere with rail transportation. Specifically, it is possible that contract remedies could force an involuntary use of railroad property within the interstate rail network, which could be preempted depending on the facts presented," citing "see *PCS Phosphate*."

You don't have an easy task. I think the proper course here is to say the parties entered into this contract, they did impose a clause that says you cannot arbitrarily withhold consent if shipper needs indicate that more traffic is needed than 25. Because of the common-carrier obligation, because of the *Baltimore & Ohio* decision, it would create an illegality for the Tribe to be able to say just no, and therefore that decision

would be arbitrary. So the Court must conclude that, in this instance, the remedies sought by the Tribe are not to be granted.

Alternatively, if the Court just finds the clause illegal, we will have to deal with that consequence. We would have to probably come back to the Court and figure out what the result of it is. I think the result is, that sub-clause gets erased and the rest of the easement stays intact. Because the parties had a remedy. If the number of cars is exceeded, there's economic remedy already built in. So it doesn't gut the contract.

Alternatively, if the Court somehow doesn't stop there and wants to grapple with IRWA and ICCTA, I think given that the Department of Interior itself has said, look, we're granting an easement -- approving an easement, it is subject to all applicable federal law. That has to mean, in the context of our situation, common-carrier law, and that means the restriction that would unreasonably restrict the flow of interstate commerce. To dovetail those two, I think you would have to conclude this is a preempted matter, let's go to the STB and see what they say, and then you wouldn't make the substantive decision at all.

Thank you, Your Honor.

THE COURT: Thanks, Mr. Keehnel.

Okay. What I want to do is, I want to take about a 15-minute break now. When we come back, Mr. Brain, you will have 15 minutes, and then, Mr. Keehnel, you will have 15 minutes, and we will finish at noon, okay?

All right. We will be at recess.

(Proceedings recessed.)

THE COURT: Thank you. Please be seated.

Okay. Mr. Brain.

MR. BRAIN: Yes, Your Honor. I think you will be glad to hear I'm not going to use my 15 minutes. I'm going to use a shorter time.

THE COURT: It depends on what that means.

MR. BRAIN: Don't we bow down to that so often.

Your Honor, first of all, I want to acknowledge that we appreciate your recognition of the importance of tribal rights. And I want to also then focus on what I covered earlier in my argument, and that is how did we start all of this. Because when it really comes down to it, which has control? 25? 49?

And I will point out again that 49 has a generic reference to federal laws. What we have to realize, and I think you know this, there is no parallel set of federal laws for anything even remotely close to what happens with tribal rights. We don't have other sovereign governmental entities. We have states, we have local jurisdictions, and we have the United States government, and we have Indian rights. And I think also you pointed out, and we agree, those rights start with a treaty. That's a contract between the United States and those tribes. And that treaty, to take what they propose, would be having the United States breach its treaty. That treaty is then implemented by Title 25, which

has the laws related to Indians. It's broader than just the IRWA, we know that, and there are regulations. But those regulations and those laws are how you interpret those treaty rights that were granted. And the government in this situation has much more than simply a contractual relationship with the Tribe. It has a fiduciary relationship. It is the trustee of their lands. They could not make this grant on their own. But they have one right, one right under those rights, and that is the right to consent to whatever conditions or provisions are in that grant of easement. And to adopt the position that this provision, that Section 7c, is meaningless, is to vitiate the right of consent. It's that simple. You're basically saying your consent doesn't matter. And that's not what the Ninth Circuit has held, and that's not what the law is. You have the right to consent.

But BNSF says if that consent imposes a provision that we don't like, that otherwise could be illegal on us, then your right of consent is meaningless, superfluous, and not honored. And, Your Honor, I would go further to say that this is so significant to this agreement, that it's a lack of consideration. Why would a tribe ever have consented to this or done this? It would have been much better off to go forward.

And, again, I point to the fact that this agreement, the settlement agreement and the treaty, both address this economic center. And you have seen it. You have got the photograph.

It's right there. That's why it was of concern for them. And this was a tribe that did not have an economic center in 1989. It was something they were putting together. They were looking to the future. And these provisions were important. They aren't meaningless.

And the IRWA is not meaningless. And if you look at the canons of interpretation -- and I quoted some of those cases, and they're in our briefs -- clearly, when you come to a conflict, the laws related to Indians are to be interpreted to their benefit and their protection, starting with the treaty rights.

I don't have too much more to say. I would like to say that, just to correct it, we have received no payments for increased traffic. There was an adjustment of the rental pursuant to the provisions that allow for an adjustment. It was based upon one train each way of 25 cars. That was the appraisal. And it was adjusted. But there has been no payments.

And, lastly, Your Honor, I want to talk about the fact that because this agreement is a right of consent and the fact that we're dealing with a treaty, statutory and contractual rights under those treaties, that a damages remedy is simply not an adequate remedy. We're basically saying that you are giving up property rights in lieu of money. And that's not what the agreement says. It's just simply not what they bargained for. And had they known, and I think it's pretty clear, had they known that BNSF would some day say these provisions are meaningless

because we might be violating some obligations we have -- of course, we represented to you that we could enter into this agreement -- that we could simply obviate it.

And, lastly, Your Honor, counsel suggests that we go back to the STB. We're not going to go to the STB. They did an end-around. They tried to go to the STB and have them basically make a quick decision before you could hear this motion. STB denied that motion. But that's not where we would go. Where we would go is to the Department of Interior, because that's where the remedies are. But the draconian remedy that we would go for is termination. We're not asking for that. We're asking for the compromise. It's the same compromise today as it was back in 1989, and that is that this agreement be enforced.

THE COURT: And let me just ask you for a second, Mr. Brain, you know, you said it wouldn't be fair for Burlington Northern to say, well, we don't like that or we don't want to comply with that because we don't like it. That's not what they are saying. They are saying that we have common-carrier obligations, we have shipper obligations that we must respect. How do you merge that with the clause that says, you know, shipper needs are going to change, it was never just, solid, one train a day or 25 cars, and the Tribe should not arbitrarily withhold its consent. What's the mechanism? There's not like a referral to an arbitration panel or anything like that. Who's going to decide, under what situations, whether it's an arbitrary

withholding of consent?

MR. BRAIN: Ultimately, Your Honor, I think that if we couldn't agree, the Court would.

THE COURT: Yeah.

MR. BRAIN: I mean, that's what it really comes down to. Let's assume that they had complied with the agreement and said, Tribe, we want to ship more cars and more trains per day, and here is the reasons why, please consider it; and we said, well, give us more information; they give us more information; we say, no, here is the concerns we have, we didn't bargain for that; and they say, well, we think we have the right to do it; then we would be here.

THE COURT: Yeah. That's what I was afraid of. Yeah. You know, I was the settlement judge on the shellfish portion of the *United States v. State of Washington*, and it was a very interesting process to go through, because there you had all the tribes and the state and the federal government. And we were able to actually work something out. My favorite part of that was going around my conference room with all the different tribes, and they had hired a biologist to advise them on some of the provisions of the agreement as it related to shellfish, and each one of the tribes said, yeah, we agree with that, yeah, we agree with that, yeah, we agree with that, until I got to the Tulalips, and the Tulalips said, "Nobody speaks for Tulalips except Tulalips." And I said, "Well, what's your position?"

And, of course, it was exactly the same as the others. But, yeah, you know, sometimes you just have to assert yourself, so be ready for that.

But, you know, one of the reasons these things -- you look at some of those STB cases, and they're like: Why don't you try to work these things out? Is there any desire to try to work these things out, short of having me decide this, that you want to explore? Just a yes or no on that one.

MR. BRAIN: I'm going to say no.

THE COURT: Okay. That's fine.

MR. BRAIN: And the reason I'm going to say that, Your Honor, is that if you look at opening this door to the magnitude that they want to open it, and then you consider the possibility that this deep-water port could be an offloading port for crude oil, when the Trump administration attempts to change the laws to allow that, how many trains is too much? And I think that you have to draw the line. And this is the line, and it's so material that we're going to stick with it.

THE COURT: Okay. Thanks, Mr. Brain.

Mr. Keehnel.

MR. KEEHNEL: So I'm just going to go over the roadmap that I think I would try to follow in your chambers.

You are going to have to figure out, was the Tribe's withholding of consent here arbitrary? I think there's a way for you to find that, because it would cause a violation of law and

the common-carrier obligations couldn't be satisfied, that you could, even using the definitions proffered by the Tribe, say, it's not principled here, therefore it's arbitrary to withhold consent, given that you would put Burlington Northern Sante Fe in the position of violating its federal obligations.

If you aren't there and you have to read the clause in the way that the Tribe has suggested, that arbitrary means there's no limitation whatsoever, even if it's an illegal act that would be engendered, then I think you entertain the possibility of striking that limitation. Because otherwise it's an illegal limitation.

If somehow you escape from that morass -- and I hope you don't have to escape from that morass; I hope you make a decision within the confines we just discussed -- you have to get into what happens between ICCTA and IRWA.

I just want to leave you with this. The whole point of our discussion of *Merrion*, in the briefing and earlier today in my oral presentation, is that while tribes, yes, are sovereigns, the United States Supreme Court has said there are limits to that sovereign power. One of those limits is, if you are going to permit someone to come onto your property and you put conditions on that, those conditions can be those only that are, quote, "consistent with applicable federal laws," close quote. Now, from the Tribe's perspective, that's not something I want to hear. I want to have complete carte blanche. I don't want the

federal government saying there are other laws that apply here when they're germane. But it is germane. And it is one, I'm afraid, that if you get to the point of having to grapple with IRWA and ICCTA, that you should come out knowing that when consent ultimately was given by the Bureau of Indian Affairs in, I think, 1991, regardless of what the words said, it had to be subject to that federal law requirement of common law obligation -- or, excuse me, of the common-carrier obligation.

I can't accept that the regulation that was adopted a few years ago by the Department of Interior in the IRWA context here, saying that, quote, "rights-of-way approved under IRWA are subject to all applicable federal laws," I can't believe that anyone in that agency for a second thought that was a sea change. And that's what the Tribe is asking us to believe today, that despite *Merrion* decided in 1982, when BIA adopted that regulation a few years ago, that it marked a complete sea change; that suddenly, instead of anything that IRWA approved in the way of an easement, that was not subject to common-carrier obligations, that now it would be, like that. That makes no sense. That's a dramatic shift. It makes no sense.

The regulation was not talked about in those terms. The regulation was talked about internally and in the published preamble. You know, the stuff that's in front of you. We put in front of you the preamble. It was prepared by the drafter itself, the agency. They said this just confirms what we're

doing, what we know, what the law is. And they don't list that -- not just this regulation, but a series of regulations, in a block, were challenged in a court proceeding. We cited it in a footnote towards the end of our reply brief. And, again, the agency comes forward and says, this is just business as usual, we know this is already the case as to that particular clause.

Your Honor, it's not difficult, I think, to read the two together. And to read the two together, you have to understand, the Department of Interior grants a lot of easements that are not subject to common-carrier obligations: private easements, easements that are used that just don't trigger common-carrier obligations. No one is saying that that approval process is going to get repealed. This is not an implicit repeal. It's just that when there are common-carrier obligations, those have to be part of the built-in subsumed grant of the easement. It doesn't require striking anything down. It just requires acknowledging what IRWA itself, the BIA, Department of Interior have acknowledged, when they grant an easement, it's subject to all applicable laws. ICCTA is applicable, not just in the preemption way, but in the common-carrier obligation way.

I think that gives you a path to get there without having an agonizing holiday season. And if I don't see you again, which I hope not to this year, have a happy holiday season.

THE COURT: Thanks very much, Mr. Keehnel.

A very interesting and challenging case. I will get to it

and try to get my decision out by Monday. So we will have something for you hopefully by then. If not, I will get out to you that we're not going to -- I will put something on the CM/ECF that says, despite the Court's best intentions, it will actually be sometime in early January. But we will try to get it out by Monday.

Thank you very much for the excellent briefing, all the materials you sent me, and for the arguments today. And everybody enjoy the rest of the holiday season.

We will be adjourned. Thank you.

(Proceedings adjourned.)

C E R T I F I C A T E

I, Nickoline M. Drury, RMR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do certify that the foregoing pages are a true and accurate transcription of the proceedings to the best of my ability.

/s/ Nickoline Drury

Nickoline Drury